A **AMBIYA MOHAMAD & ORS**

**v.**

**PP**

B COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEALS NO: W-05-96-04-2012,
C W-05-97-04-2012, W-05-98-04-2012 & W-05-99-04-2012]
17 MARCH 2014

***CRIMINAL PROCEDURE:*** *Witness - Calling of witness by prosecution - Accused persons charged for common intention of trafficking*
D *in 212.6g dangerous drugs - Negotiation for sale and purchase of drugs carried out by third party - Participation of third party - Whether active - Whether role of third party led to arrest of accused persons - Whether third party mere informer or agent provocateur - Dangerous Drugs Act 1952, s. 39B(1)(a)*

E ***EVIDENCE:*** *Adverse inference - Failure of prosecution to call informer as witness - Accused persons charged for common intention of trafficking in dangerous drugs - Negotiation for sale and purchase of drugs carried out by third party - Participation of third party - Whether led to arrest*
F *of accused persons - Non-calling of third party as witness - Whether detrimental to prosecution's case - Whether adverse inference ought to be invoked - Evidence Act 1950, s. 114(g)*

***EVIDENCE:*** *Agent provocateur - Informer - Accused persons charged for common intention of trafficking in dangerous drugs - Negotiation for*
G *sale and purchase of drugs carried out by third party - Participation of third party - Whether active - Whether role of third party led to arrest of accused persons - Whether third party mere informer or agent provocateur - Whether protected under s. 40 Dangerous Drugs Act 1952*

H Acting upon information received from an informer/third party that a certain drug trafficking activity would take place, PW9 and one Sergeant Magendran acted as agent provocateurs and met up with the drug sellers. The police did not at all negotiate with the drug sellers on the terms of the sale of the impugned drugs and the
I mode of delivery of the drugs. Instead, all this was done by the informer. The agent provocateurs brought along a sum of RM86,800 as purchase price for seven pounds of heroin to the

targeted area ('the area'). After arriving at the area, they were joined by the informer who asked them whether they had brought enough money. According to PW9, the first and second appellants then came while the informer left them. Satisfied that the agent provocateurs had brought the money, the first appellant made a telephone call to the third appellant to bring the drugs. The third appellant then came with the fourth appellant and handed a plastic bag to the first appellant. Sergeant Magendran opened the plastic bag and found a box wrapped with paper. Inside the box were seven transparent plastic packets containing substances suspected to be drugs. The police party who were waiting to ambush then sprung into action and arrested all the four appellants. At the High Court, the appellants were jointly charged for common intention of trafficking in 212.6g of mixture of heroin and monoacetylmorphines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Satisfied that the prosecution had proven its case against all the appellants beyond reasonable doubt, the trial judge found the appellants guilty, convicted them and sentenced them to death. Hence, the present appeal. The appellants argued that the informer was an active participant in the entire episode leading to their arrests. The informer had immersed himself in the police operation and was no longer a mere informer but had become an active agent provocateur. Therefore, it was submitted that the non-calling of the informer had compromised the prosecution's case and would trigger the invocation of adverse inference under s. 114(g) of the Evidence Act 1950 ('the Act').

**Held (allowing appeal; setting aside convictions and sentences)**

**Per Azahar Mohamed JCA delivering the judgment of the court:**

**(1)** The police did not at all negotiate with the appellants on the terms of the sale and the mode of delivery of the drugs. All this was done by a third party who was described as an informer and/or agent provocateur by the appellants. Based on the entire circumstances and the conduct of the third party, the third party was not eligible to be regarded as an informer and/or agent provocateur. (para 13)

**(2)** If the third party was an informer, he would be a 'protected species' under s. 40 of the DDA and need not be called unless the trial court deemed fit to do so. The role of the

A third party was not merely to introduce both PW9 and Sergeant Magendran to the first and second appellants at the area. In fact, the third party was an active participant in the entire episode leading to the arrests of all the appellants and the seizure of the offending drugs. His presence at the area
B was not merely to lend credence to PW9's intention to purchase drugs in the minds of both the first and second appellants. (paras 14 & 19)

**(3)** The third party had crossed the line to be eligible for
C protection under the DDA. He was not a mere informer; he was a *particeps criminis*. The third party was the active instrument without whose involvement, all the appellants might never have been arrested. He had not only lost protection under s. 40(1) of the DDA but more significantly, he belonged
D to the class of witnesses 'essential to the unfolding of the narratives on which the prosecution is based'. The third party held the key to the unfolding of events, without which there were gaps in the prosecution's case and his role was the determining factor in the sale transaction of the drugs to
E PW9. (paras 19 & 20)

**(4)** The failure on the part of the prosecution to call the third party was fatal and would attract invocation of s. 114(g) of the Act. The glaring omission to call the third party had
F deprived all four appellants the right to a fair trial. The trial judge did not direct his attention to this critical point in his judgment and this was a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice. The trial judge had committed appealable errors
G warranting appellate interference. The appellants' convictions were wholly unsafe. The appellants were acquitted and discharged. (paras 20 & 21)

***Bahasa Malaysia*** *Translation Of Headnotes*

H Bertindak atas maklumat yang diterima daripada seorang pemberi maklumat/pihak ketiga bahawa satu aktiviti pengedaran dadah akan berlaku, PW9 dan seorang yang dikenali sebagai Sarjan Magendran telah bertindak sebagai ejen-ejen perangkap dan bertemu dengan penjual-penjual dadah. Pihak polis tidak berunding dengan penjual-
I penjual dadah tersebut mengenai terma-terma jualan dadah yang dipertikaikan dan cara dadah tersebut akan dihantar. Sebaliknya, kesemuanya dilakukan oleh pemberi maklumat. Ejen-ejen perangkap

membawa bersama-sama mereka sejumlah RM86,800 sebagai harga belian untuk tujuh paun heroin ke tempat sasaran ('tempat tersebut'). Selepas tiba di tempat tersebut, mereka disertai oleh pemberi maklumat yang bertanyakan kepada mereka sama ada mereka telah membawa wang yang cukup. Menurut PW9, perayu pertama dan kedua kemudiannya tiba manakala pemberi maklumat meninggalkan mereka. Berpuas hati bahawa ejen-ejen perangkap telah membawa wang, perayu pertama membuat panggilan telefon kepada perayu ketiga untuk membawa dadah tersebut. Perayu ketiga kemudiannya tiba dengan perayu keempat dan memberikan satu beg plastik kepada perayu pertama. Sarjan Magendran membuka beg plastik tersebut dan mendapati bahawa terdapat sebuah kotak yang dibalut dengan kertas. Dalam kotak tersebut terdapat tujuh paket plastik lutsinar yang mengandungi bahan yang disyaki dadah. Pihak polis yang sedang menunggu untuk menyerang hendap segera bertindak dan menangkap keempat-empat perayu. Di Mahkamah Tinggi, keempat-empat perayu dituduh bersama bagi niat bersama untuk mengedar 216.6g campuran heroin dan monoacetylmorphines, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Berpuas hati bahawa pihak pendakwaan telah membuktikan kesnya terhadap keempat-empat perayu melampaui keraguan munasabah, hakim bicara memutuskan bahawa perayu-perayu bersalah, mensabitkan mereka dan menjatuhkan hukuman mati ke atas mereka. Dengan itu, rayuan ini. Perayu-perayu menghujahkan bahawa pemberi maklumat adalah orang yang mengambil bahagian secara aktif dalam keseluruhan episod yang membawa kepada tangkapan mereka. Pemberi maklumat telah melibatkan dirinya dalam operasi polis dan bukan sekadar menjadi pemberi maklumat sahaja tetapi telah menjadi ejen perangkap yang aktif. Oleh itu, dihujahkan bahawa kegagalan memanggil pemberi maklumat telah menjejaskan kes pendakwaan dan akan membangkitkan anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950 ('Akta').

**Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman)**

**Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:**

**(1)** Pihak polis tidak berunding sama sekali dengan perayu-perayu mengenai terma-terma jualan dadah-dadah tersebut dan cara penghantarannya. Semua ini dilakukan oleh pihak ketiga yang disebut sebagai pemberi maklumat dan/atau ejen perangkap

A oleh perayu-perayu. Berdasarkan kesemua hal-hal keadaan dan tindakan pihak ketiga, pihak ketiga tidak layak dianggap sebagai pemberi maklumat dan/atau ejen perangkap.

**(2)** Sekiranya pihak ketiga adalah pemberi maklumat, dia adalah
B 'spesies yang dilindungi' di bawah s. 40 ADB dan tidak perlu dipanggil melainkan mahkamah bicara merasakan adalah wajar untuk berbuat sedemikian. Peranan pihak ketiga bukan sekadar memperkenalkan kedua-dua PW9 dan Sarjan Magendran kepada perayu pertama dan kedua di tempat tersebut.
C Malahan, pihak ketiga adalah orang yang mengambil bahagian secara aktif dalam keseluruhan episod yang membawa kepada tangkapan perayu-perayu dan rampasan dadah-dadah tersebut. Kehadirannya di tempat tersebut bukan hanya untuk memberi kepercayaan kepada niat PW9 untuk membeli dadah dalam
D minda kedua-dua perayu pertama dan kedua.

**(3)** Pihak ketiga telah melampaui batas untuk menjadi layak bagi perlindungan di bawah ADB. Dia bukan sekadar pemberi maklumat; dia adalah seorang *particeps criminis*. Pihak ketiga
E adalah instrumen yang aktif yang mana tanpa penglibatannya, kesemua perayu mungkin tidak tertangkap. Dia bukan sahaja kehilangan perlindungan di bawah s. 40(1) ADB tetapi lebih penting lagi, dia tergolong dalam kelas saksi-saksi yang 'penting dalam merungkai naratif-naratif yang menjadi asas pendakwaan'.
F Pihak ketiga memegang kunci kepada rungkaian peristiwa-peristiwa, yang tanpanya akan wujud jurang dalam kes pendakwaan dan peranannya adalah faktor penentu dalam transaksi jualan dadah-dadah kepada PW9.

**(4)** Kegagalan pihak pendakwaan untuk memanggil pihak ketiga
G adalah menjejaskan dan mengundang bangkitan s. 114(g) Akta. Ketinggalan jelas untuk memanggil pihak ketiga telah menafikan keempat-empat perayu hak kepada perbicaraan yang adil. Hakim bicara tidak menumpukan perhatiannya kepada hujahan kritikal ini dan ini adalah satu salah arahan akibat daripada
H tiada arahan yang menyebabkan ketidakadilan serius. Hakim bicara telah melakukan kekhilafan yang boleh dirayu yang mewajarkan campur tangan mahkamah rayuan. Sabitan perayu-perayu secara keseluruhannya tidak selamat. Perayu-perayu dilepaskan dan dibebaskan.

I

**Case(s) referred to:**
*Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC* ***(refd)***
*Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC* ***(refd)***
*Roy Sabara & Anor v. PP [2013] 1 LNS 1028 CA* ***(refd)***
*Seneviratne v. R [1936] 3 All ER 36* ***(refd)***
*Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC* ***(refd)***
*Wan Mohd Azman Hassan v. PP [2010] 4 CLJ 529 FC* ***(refd)***
*Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC* ***(refd)***

**Legislation referred to:**
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2), 40(1), 40A(1)
Evidence Act 1950, s. 114(g)
Penal Code, s. 34

*For the appellants - Hisyam Teh Poh Teik (Rajpal Singh with him); M/s Teh Poh Teik & Co*
*For the respondent - Samihah Rhazali; DPP*

*[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-52-2009]*

*Reported by Najib Tamby*

## JUDGMENT

### Azahar Mohamed JCA:

**[1]** All the four appellants namely, Ambiya binti Mohamad ('first appellant'), Arafah binti Abu ('second appellant'), Lim Siau Seng ('third appellant') and Vigneswaran a/l Kanissen ('fourth appellant') were jointly charged and tried together before the Kuala Lumpur High Court with common intention for trafficking in 212.6 grammes of a mixture of heroin and monoacetylemorphines, an offence in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable with mandatory death penalty under s. 39B(2) of the DDA read together with s. 34 of the Penal Code ('the Code').

**[2]** The offence was said to have been committed at the car park, in front of Maybank, Jalan Manis 6, Taman Segar, in the district of Cheras, Kuala Lumpur, at about 6.05pm on 3 April 2009.

**[3]** At the conclusion of the trial, the learned trial judge was satisfied that the prosecution had proven its case against all the four appellants beyond reasonable doubt. The learned trial judge found all the appellants guilty and convicted them of the charge. They were then sentenced to the mandatory death penalty prescribed by the DDA.

**[4]** The appellants then appealed to this court. We heard their appeal, wherein at its conclusion, we unanimously allowed it. As a result, the convictions were quashed and the sentences set aside. We now give our reasons.

**[5]** Very briefly the facts giving rise to the charge against the appellants are as follows. Acting on information received from an informer, Inspector Mohd Normal Hisyam ('PW12') had on 3 April 2009 instructed both D/Sjn Munusamy a/l Kanasan ('PW9') and one Sjn Magendran to be agent provocateurs. There is one point which needs to be emphasised here: the prosecution regarded the informer as a 'protected species' under the DDA. We will say more about the true status of the informer later in this judgment. Indeed, as we shall see later, this issue turned out to be of critical importance in the determination of this appeal before us.

**[6]** Continuing with the sequence of events, both PW9 and Sjn Magendran were instructed by PW12 to meet with the sellers of the drugs at the car park at Taman Segar, Cheras in front of Maybank ('targeted area'). They brought along a sum of RM86,800 as purchase price for seven pounds of heroin at RM12,400 per pound to the targeted area. In the meantime at about 5pm on the same day, PW12 and a police raiding team had taken up ambush positions and carried out surveillance at the targeted area.

**[7]** Not long after that, both PW9 and Sjn Magendran arrived at the targeted area in a Proton Waja car ('the Proton Waja'). Subsequently, the informer showed up on a motorcycle and asked whether they brought enough money. The material part of the evidence of PW9 is as follows:

> Sampai sahaja di situ, kami parking kereta kami, saya lihat sumber terus datang kepada kami, dan berbincang, tak sampai 5 minit, sumber datang dengan naik motosikal; dia berbincang tentang duit, dia kata "dah cukup ke?"; iaitu di luar kereta, bahagian belakang kereta.

Lebih kurang 5 minit kemudian, saya nampak 2 orang perempuan menghala ke arah kami dengan berjalan kaki, mereka berjumpa dengan kami di belakang kereta tersebut. Masa itu ada 5 orang, iaitu saya, Sjn. Magendran, sumber dan 2 perempuan tersebut.

Sumber kemudian perkenalkan kami dengan 2 perempuan itu dan beritahu bahawa saya dan Sjn. Magendran adalah pembeli dadah heroin tersebut.

Selepas itu sumber beritahu, dia ada hal dan pergi daripada situ, dengan menaiki motosikalnya dia keluar daripada situ; tinggal kami empat orang sahaja.

Salah sorang perempuan warganegara asing itu tanya "duit ada ke?"

Magendran jawab "ada"'.

Saya boleh camkan 2 perempuan ini, mereka ada dalam Mahkamah, OKT1 dicamkan sebagai Ambiya dan OKT2 ialah Arafah.

**[8]** Continuing with his evidence, PW9 said that both the first and second appellants then entered the rear passenger of the Proton Waja, where Sjn Magendran passed them the bag containing the money. Both the appellants counted the money and after that, they came out of the car. Afterwards, the first appellant made a telephone call and PW9 heard she said "duit sudah ada, barang boleh masuk".

**[9]** A few minutes later, a Toyota Camry car ('the Camry') appeared. The third appellant was the driver of the Camry and the fourth appellant was seated on the front passenger seat. The first appellant then approached the third appellant where the third appellant handed over to her a plastic bag through the window of the Camry. The first appellant took the plastic bag, proceeded to the Proton Waja and put it on the top of the boot of the Proton Waja. Sjn Magendran opened the plastic bag. Inside it was a box wrapped with paper. Inside the box were seven transparent plastic packets containing powdery and granular substances suspected to be drugs, which formed the subject matter of the charge in the present case. Sjn Magendran then gave the pre-arranged signal to the raiding team to effect arrest. Eventually, all the four appellants were arrested.

**[10]** From what has been outlined above, some important points emerge: first, both PW9 and Sjn Magendran did not negotiate with any of the appellants with regard to the type of drugs, the amount of drugs and the price of the drugs; second, the price and the amount of drugs had been pre-determined.

**[11]** It is against the above backdrop, learned counsel for all the appellants argued that the non-calling of the informer had compromised the case for the prosecution. It was argued that the informer was in fact an active participant in the entire episode leading to the arrests of the appellants. According to learned counsel, the informer had immersed himself in the police operation and he was no longer a mere informer but had become an active agent provocateur. Learned counsel argued to the effect that the very failure by the prosecution to call the informer would trigger an adverse inference against the prosecution's case, under s. 114(g) of the Evidence Act 1950 ('EA'). It was further argued that the learned trial judge erred in law and in fact when he failed to hold that the informer had assumed the mantle of an agent provocateur and as such the failure by the prosecution to call him as a witness or to offer him for cross-examination was fatal.

**[12]** On the other hand, the learned Deputy Public Prosecutor ('DPP') argued that the informer did not play an active role and therefore need not be called as a witness. For that reason, the DPP argued that the informer was not an agent provocateur and that the non-calling of the informer did not cause any gap in the prosecution's case. Hence, according to the DPP adverse inference under s. 114(g) of the EA cannot be invoked against the prosecution for the non-calling of the informer. We are unable to agree with the submissions of the DPP.

**[13]** It is imperative to note at this juncture that PW9, PW12 and Sjn Magendran did not at all negotiate with the appellants on the terms of the sale of the impugned drugs and the mode of delivery of the drugs in question. It is important to point out that all this was done by a third party who is described as an informer and/or agent provocateur by learned counsels for the appellants. Based on the entire surrounding circumstances of the present case and the conduct of the third party, we do not think that the third party is eligible to be regarded as informer and/or agent provocateur. More on this later. From this point on, we shall refer the so-called informer as the third party.

**[14]** The DDA does not define the terms informer or agent provocateur. In common manner of speaking, an informer is a person who gives information about a crime which has happened or is happening or is going to happen; who are the persons involved and how they operate and the *modus* of criminal activities, etc. An informer is not a person who deals with the criminals and negotiates in a case of trafficking the terms of the sale of drugs until delivery. If the third party is an informer, he is a 'protected species' under s. 40 of the DDA and need not be called unless the trial court deems fit to do so. The law relating to 'informers' had been dealt with by Hamid Sultan bin Abu Backer, JCA in the Court of Appeal decision of *Roy Sabara & Anor v. PP* [2013] 1 LNS 1028; [2013] AMEJ 0131.

**[15]** The term 'agent provocateur' is also not defined anywhere in the DDA. Ordinarily, it will mean that a person employed with suspected individuals or groups with the purpose of encouraging them to commit a crime and subsequently trapping them upon the crime having been committed. The use of agent provocateurs is now a common technique employed by the police in apprehending drugs traffickers (see: *Wan Mohd Azman Hassan v. PP* [2010] 4 CLJ 529). If the person is an agent provocateur, he becomes a material witness to unfold the case of prosecution and some protection as well as probative force is given to the agent provocateur under s. 40A(1) of the DDA. That provision stipulates that no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence if the attempt to abet or abetment was for the sole purpose of securing evidence against such person. It is an established principle of law that an agent provocateur's evidence requires no corroboration and that an accused person can be convicted on the uncorroborated evidence of the agent provocateur if the court accepts the truth of the evidence (see: *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17, *Namasiyiam Doraisamy v. Public Prosecutor & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241). The important point to note in the instant case is that the third party who did not give evidence will not qualify as an agent provocateur under the DDA.

**[16]** We shall now elaborate on why we take the view that the third party cannot be regarded as an informer and thus he is not protected under s. 40 of the DDA. On the particular facts and

A the circumstances of the present case, we found that all dealings with regard to price and the amount were arranged between the third party and PW12. In the words of PW9:

S: Jadi kamu setuju, bahawa sumber ada berurusan dengan Inspektor Hisham untuk jual beli?

B

J: Masa taklimat pertama pada jam 9.00 pagi memang ada urusan dengan sumber iaitu buat perjumpaan dengan sumber, selepas taklimat kedua pukul 2.00 petang memang sumber tiada, perbincangan di antara sumber dengan Inspektor Hisham kami tidak tahu, yang kali kedua pukul 2.00 baru Inspektor Hisham beritahu yang dia boleh sediakan 7 pound harga RM86,800. Jadi saya setuju soalan ini.

C

S: Setuju sumber dan Inspektor Hisham ada berurusan jual beli?

D J: Setuju.

In another part of his evidence, PW9 said:

S: Siapa yang sebenarnya telah berbuat urusan tentang 10 pound kepada 7 pound dengan harga RM86,800?

E

J: Antara sumber dengan Inspektor Hisham.

**[17]** We must now direct our attention to the evidence of PW12. His evidence established that it was the third party who had determined the amount of drugs, the price and the place of the F transaction and then conveyed the same to PW12. This is what PW12 said in his evidence:

Selepas itu jam lebih kurang 12.00 tengah hari, saya terima panggilan daripada sumber saya mengatakan bahawa urusan berkenaan dengan penyerahanan barang kes disyakki dadah akan G dilakukan di sekitar Taman Segar, Cheras yang melibatkan urusan jual beli dadah jenis heroin sebanyak 7 pound dengan harga RM12,400 satu pound.

Sebelum sumber beredar daripada pejabat saya di sebelah pagi itu, H saya ada mengarahkannya untuk menetapkan masa, tempat urusan jual beli dadah di antara sumber dengan sindiket dan anggota AP.

**[18]** Later in his testimony, PW12 confirmed that the third party was in fact the active participant in the entire episode:

I S: Siapa yang dealing dengan OKT1 dan OKT2?

J: Sumber diberitahu maklumat tentang penglibatan semua suspek terutama suspek wanita, ditawarkan maklumat tersebut kepada dia, dan sumber melaporkan apa yang diketahuinya kepada saya untuk tindakan selanjutnya.

P/Bela: Saksi tidak jawab soalan.

S: Siapa yang berurusan dengan OKT1 dan OKT2?

J: Saya.

S: Jadi jawapan kamu sebentar tadi adalah bohong?

J: Tidak setuju.

S: Apakah cara kamu berurusan dengan OKT1 dan OKT2?

J: Lebih kepada maklumat untuk saya ambil tindakan. Urusan tersebut melalui cara maklumat yang saya terima daripada sumber yang mana sumber memberitahu saya sindiket merupakan pengedar dadah jenis heroin.

S: Katakan: Bahawa kamu tidak pernah bercakap atau berjumpa dengan OKT1 dan OKT2 sehingga kejadian tangkapan.

J: Ya.

**[19]** The primary facts that can be gleaned from the above passages are as follows. In the first place, PW9 did not negotiate with any of the appellants with regard to the price and amount of drugs that he and Sjn Magendran wanted to purchase. Secondly, PW12 also did not deal or negotiate with any of the appellants with regard to the sale and purchase of the drugs. And thirdly, as can be compellingly inferred from the evidence that it was the third party who had negotiated with the syndicate on the amount of drugs, the price and the place of delivery and upon the negotiation passed the information to PW12 for action to be taken. Based on all these, it is our judgment that the role of the third party was not merely to introduce both the PW9 and Sjn Magendran to the first and second appellants at the targeted area. In fact, the third party was an active participant in the entire episode leading to the arrests of all the appellants and the seizure of the offending drugs. His presence at the targeted area was not merely to lend credence to PW9's intention to purchase the cannabis in the minds of both the first and second appellants, as contended by the DPP. Indeed, the third party had crossed the line to be eligible for protection under the DDA. He had

participated in the deliberate trap set up by the police leading to the arrest of the appellants. The third party was not a mere informer; he was a *particeps criminis*. The third party was the active instrument without whose involvement all the appellants might never have been arrested (see: *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1; [1995] 2 MLJ 433).

**[20]** That being the case, in our judgment, the third party has not only lost protection under s. 40(1) of the DDA but more significantly, he belongs to the class of witnesses described by Lord Roche in *Seneviratne v. R* [1936] 3 All ER 36) as "essential to the unfolding of the narratives on which the prosecution is based". On the factual matrix of the instant case, the third party is an important and material witness to unfold the case of prosecution in the right perspective (see: *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492). In our judgment, the third party holds the key to the unfolding of events, without which there are gaps in the prosecution's case and his role is the determining factor in the sale transaction of the drugs to PW9; the failure on the part of the prosecution to call the third party is, for that reason, fatal and will attract s. 114(g) of the EA which provides that the court may presume that the evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

**[21]** Whether the effect of the testimony of the third party is for or against the prosecution, the glaring omission to call the third party in the circumstances of the present case had deprived all the four appellants the right to a fair trial. The learned trial judge did not direct his attention to this critical point in his judgment; this was, in our judgment, a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice. The learned trial judge has committed appealable errors warranting appellate interference. We were of the view that the appellants' convictions were wholly unsafe. This appeal was, therefore, allowed. Accordingly, we quashed and set aside the convictions and sentences against all the appellants. They were acquitted and discharged.